

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RYAN JACKSON,

Appellant.

No. 38669-1-II

UNPUBLISHED OPINION

Armstrong, J. — Ryan Jackson appeals his convictions for two counts of animal cruelty and one count of failure to provide humane care, arguing that (1) the evidence was insufficient to support his convictions; (2) the trial court should have granted his motion for a new trial because of juror misconduct; (3) his counsel ineffectively represented him by failing to timely file the motion for a new trial; and (4) the trial court should not have admitted evidence of prior misconduct under ER 404(b). Finding no reversible error, we affirm.

FACTS

On March 4, 2008, Donna Ray, Ryan Jackson's neighbor, called animal services to report on the condition of Jackson's two dogs. Ray spotted one of the dogs, Nikki, a shepherd mix,

foaming at the mouth, and the other, Ginger, a beagle mix, so thin that she was having a hard time standing. Both dogs appeared very distraught. Upon closer examination, Ray found the dog kennel covered in feces and the food and water bowls empty.

Officers Kenneth Maynard and Erika Quinn-Ellenbecker of animal services responded to the call and transported the dogs to a nearby veterinary clinic. Dr. Karen Hook diagnosed Nikki with gastric dilatation (bloating) and volvulus (a twisted bowel), the latter requiring emergency treatment. Given Nikki's poor prognosis, animal services elected to euthanize her. Ginger was given food and water and kept in the hospital overnight.

On April 1, 2008, animal services received two more of Jackson's animals: a slightly underweight cat and a more severely underweight gecko. Dr. Tiffany Rainier-Quitania examined the cat, finding him stressed, dehydrated, and slightly thin. Dr. Noreen Jeremiah examined the gecko, finding him severely malnourished.

The State charged Jackson with two counts of first degree animal cruelty and two counts of failure to provide humane care. A jury convicted Jackson on both counts of animal cruelty (relating to Nikki and Ginger) and one count of failure to provide humane care (relating to the gecko).¹ Before sentencing, Jackson moved for a new trial, arguing juror misconduct. The trial court denied Jackson's motion.

ANALYSIS

I. Sufficiency of the Evidence

Jackson contends the State failed to prove animal cruelty and failure to provide humane care. He argues he presented ample evidence contradicting the State's allegations, including

¹ The trial court dismissed the count of failure to provide humane care relating to Jackson's cat.

evidence that he fed and cared for all his pets and that Nikki's extreme thinness was likely a result of Cushing's disease. Jackson also argues the State failed to prove that the dogs experienced "substantial and unjustifiable [pain] extending over a period of time." Br. of Appellant at 21.

In considering a challenge to the sufficiency of the evidence, we construe the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim that the evidence was insufficient admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Salinas*, 119 Wn.2d at 201. We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To convict on a charge of animal cruelty, the State must prove beyond a reasonable doubt that the defendant, with criminal negligence, starved, dehydrated, or suffocated an animal, causing substantial and unjustifiable physical pain that extended for a period of time sufficient to cause considerable suffering or death. RCW 16.52.205(2). To convict for failure to provide humane care, the State must prove that a defendant owned a pet and failed to provide necessary food, water, shelter, rest, sanitation, ventilation, space, and medical attention in a way that imperiled the animal's health. Thurston County Code (TCC) 9.10.050(f).

The State elicited extensive testimony concluding that the animals were starved. On a scale of one (emaciated) to nine (fat), Officer Quinn-Ellenbecker rated both dogs as a one. Dr.

Hook, who examined and treated both dogs, testified that they were emaciated and skeletal. Dr. Paul Mabrey, Jackson's expert witness, opined that Nikki's physical condition was attributable to Cushing's disease and that blood tests showed no indication of starvation. But Dr. Hook, who performed the tests and autopsy, testified that while Cushing's could have caused Nikki's symptoms, she could not say conclusively that Nikki had the disease. Dr. Hook also testified that several of the symptoms that could have been a result of Cushing's disease could have also been a result of starvation. Here, the jury was entitled to weigh the evidence, reasonably concluding that the physical condition of the dogs was a result of starvation.

The State also presented evidence of Jackson's negligence. Officer Quinn-Ellenbecker testified there was no food or water in the kennel and that she found dust covering the empty food bowl and dried up algae in the water bowl. While Jackson offered evidence of receipts for dog food, Officer Quinn-Ellenbecker calculated that, based on the food bag and receipts found in Jackson's house, he had been feeding the dogs only a fraction of what they should have been receiving. Dr. Hook confirmed that after performing an autopsy on Nikki, without finding an obvious cause for her thinness, she suspected Nikki had not been regularly fed. She also testified that Nikki's life-threatening condition upon arrival at the clinic may have been caused by a meal ingested by an animal not used to eating. Finally, Ginger improved significantly under the care of animal services, gaining back weight and muscle tone, primarily through regular feedings. All this evidence—taken in the light most favorable to the State—supports the conclusion that Jackson negligently caused the dogs' emaciated condition.

Lastly, Officer Quinn-Ellenbecker testified that Nikki was in pain when she first arrived at

the scene. Dr. Hook confirmed that Nikki felt pain, particularly from the bloating. She also testified both dogs would have experienced pain lying on their kennel's concrete floor in their emaciated conditions; that they would have been cold due to their thin coats and little fat; and that it would have been distressing for them to live in their kennel's unsanitary conditions. Moreover, it was reasonable for the jury to infer that Nikki and Ginger experienced pain from hunger. "Pain," as this court previously defined, is "a state of physical or mental lack of well-being or physical or mental uneasiness that ranges from mild discomfort or dull distress to acute often unbearable agony"; "hunger" is "the discomfort, weakness, or pain caused by lack of food." *State v. Zawistrowski*, 119 Wn. App. 730, 734, 83 P.3d 698 (2004) (quoting Webster's Third New Int'l Dictionary at 1621 (1969) and Webster's II New Coll. Dictionary at 539 (1999)). In *Zawistrowski*, the defendant's horses suffered unnecessary and unjustifiable pain as a result of being severely underweight. *Zawistrowski*, 119 Wn. App. at 736-37 (reasonable to infer that the horses felt pain from being hungry and hunger from being underweight and malnourished). Here, a jury could similarly infer, based on these governing definitions, that both dogs experienced some degree of pain as a result of being severely underweight. In sum, this evidence was sufficient to convict Jackson of both animal cruelty counts.

With respect to failure to provide humane care, the State presented evidence that the gecko was extremely thin, had poor bone density, was unable to move and properly shed its skin, and that its color was washed out. The veterinarian testified that the gecko was deficient in calcium and vitamin D3 from lack of exposure to a heat and light source. The veterinarian concluded "that this animal had been lacking in not just its basic requirements, very, very basic

requirements that this animal would need, but it also had been severely neglected and therefore that had amounted to this severe state of malnutrition.” Report of Proceedings (RP) (Sept. 24, 2008) at 403. After being taken into custody by animal services, the gecko returned to normal weight and color. Jackson’s testimony to the contrary, that he provide adequate care by obtaining the necessary cage, lighting, humidifier, and food, does not render the State’s evidence insufficient. That evidence, taken as true, supports the reasonable inference that Jackson failed to provide minimal care in a way that imperiled the gecko’s health. The evidence was sufficient to convict Jackson for failure to provide humane care.

II. Potential Juror Misconduct

Jackson argues his right to trial by jury was violated when the trial court denied his motion for a new trial and refused to grant an evidentiary hearing on whether a juror’s alleged conversation with a third party constituted prejudicial misconduct.

In his motion, Jackson requested additional time to investigate reported juror misconduct. According to Jackson, sometime close to the completion of the trial, one of the jurors discussed the case and testimony with her hairdresser. Jackson claimed the possibility of prejudice was high because of his past relationship with the hairdresser’s then-estranged wife. To support his assertion, Jackson submitted an affidavit from his ex-wife in which she stated her cousin told her that the juror “told [the hairdresser] all about the trial and said that there was a woman who testified for the defense who had been at Ryan’s home on many occasions. It was also stated that [the hairdresser] told the juror that Ryan had been dating his wife.” Clerk’s Papers (CP) at 110. Despite the late filing of the motion, the trial court entertained arguments on the merits. The trial

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court denied the motion, ruling that Jackson had established neither misconduct nor prejudice.

We review a trial court's ruling on a motion for a new trial based on possible juror misconduct for an abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 301 (1994); *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). A juror's communication with a third party about a case constitutes misconduct. *State v. Depaz*, 165 Wn.2d 842, 858-59, 204 P.3d 217 (2009). A party alleging juror misconduct must demonstrate that the misconduct actually occurred. *Balisok*, 123 Wn.2d at 117-18 ("A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury."). The trial court may grant a new trial only where juror misconduct has prejudiced the defendant. *Earl*, 142 Wn. App. at 774. Where the evidence to support a motion for a new trial based on juror misconduct is insufficient, the trial court has discretion to grant an evidentiary hearing on the matter. *State v. Hawkins*, 72 Wn.2d 565, 570, 434 P.2d 584 (1967).

The State argues that Jackson never established that misconduct actually occurred. We agree. First, the affidavit fails to establish both the juror's identity and that the alleged conversation took place before the verdict. In her affidavit, Jackson's ex-wife stated, "I do not know if this haircut was during the trial, deliberation or after the conclusion of the trial but I do know that [my cousin] called me within a couple of days [after] the conclusion of the trial." CP at 110. Jackson's allegations are too speculative to disturb a jury verdict on appeal. Second, the affidavit contains multiple layers of hearsay. Statements containing inadmissible hearsay are not an appropriate basis to establish juror misconduct. *State v. Jackson*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). Because the ex-wife's statements are unreliable, Jackson has not met his heavy

burden of showing actual misconduct.

In addition, the trial court did not abuse its discretion in denying Jackson's request for an evidentiary hearing. In *Hawkins*, the Supreme Court acknowledged the trial court's inherent authority to obtain evidence on its own initiative. *Hawkins*, 72 Wn.2d at 570. There, the court permitted further investigation into allegations that a juror actively sought information outside of evidence. *Hawkins*, 72 Wn.2d at 566. In contrast, Jackson's allegations involve a conversation that may or may not have occurred before the verdict and that may or may not have involved discussion of the jury's ultimate decision. Jackson's allegations fall short of the seriousness level of those warranting an evidentiary hearing in *Hawkins*. *Hawkins*, 72 Wn.2d at 571 ("That the taking of evidence outside the court by a juror constitutes misconduct depriving the defendant of a fair trial cannot be doubted.").

III. Ineffective Assistance of Counsel

Jackson faults his attorney for not timely filing the motion for a new trial. Jackson argues that but for counsel's untimely motion, the trial court would have granted the motion.

We review a claim that counsel ineffectively represented the defendant de novo. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish that counsel was ineffective, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense, i.e., there was a reasonable probability that, but for the deficient performance, the trial result would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). To provide

constitutionally adequate assistance, counsel must, at a minimum, reasonably investigate issues so that counsel can make informed decisions about how best to represent the client. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). A defendant must also overcome a strong presumption that counsel's conduct was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 988 P.2d 1251 (1995).

The motion was filed on October 22, 2008, 23 days after the jury delivered its verdict. *See* CrR 7.5(b) (requiring that a motion for a new trial be filed within 10 days of the verdict). But Jackson is unable to show prejudice from the late filing. Although noting Jackson's failure to comply with CrR 7.5(b), the court entertained the motion on the merits, dismissing the motion for a new trial on the grounds that Jackson failed to establish the misconduct occurred. Thus, Jackson was not harmed by the late filing. Also, Jackson does not address the argument that counsel failed to reasonably investigate the allegations. *See State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (without argument or authority to support it, assignment of error is waived). Even if counsel did not properly investigate the claim, Jackson has not shown a resulting prejudice by producing evidence that would have substantiated his allegations. His claim of ineffective representation fails.

IV. ER 404(b) Evidence

Jackson finally contends the trial court erred in admitting evidence of a 2007 complaint to animal services against Jackson, which he claims was irrelevant and unduly prejudicial. The State responds the evidence was relevant to (1) show Jackson's knowledge of unacceptable kennel conditions; (2) show the absence of a mistake or accident; (3) "complete the story" of the crime

on trial; and (4) prove the length of time the dogs had been underfed. Br. of Resp't at 11-13.

Before trial, the State sought to admit evidence of Jackson's prior misconduct under ER 404(b). The proffered evidence consisted of Ray's testimony that in March 2007, almost a year before the incident on trial, she lodged a complaint with animal services that Jackson's dog kennel was covered in feces. Officer Maynard testified that he responded to the complaint and issued a "verbal warning" after speaking with Jackson, who explained he was not currently living at the residence and that he would take care of the problem when he moved back in that weekend. RP (Oct. 23, 2008) at 185-87. Notably, there was no evidence that any of the pets were malnourished or unhealthy. The trial court admitted the evidence, finding it relevant to the defendant's knowledge of the conditions being alleged, "an essential element of the State's case," and also relevant to allow the State to present the "whole story, the picture," because the crime of animal cruelty, as charged in this case, does not occur in one specific instance. RP (July 7, 2008) at 28.

Generally, evidence of a defendant's prior misconduct is inadmissible to demonstrate the accused's propensity to commit the crime charged. ER 404(b). A trial court may, however, admit evidence of prior misconduct for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b); *see also State v. Tharp*, 96 Wn.2d 591, 594, 637 P.2d 961 (1981) (recognizing a *res gestae* or "same transaction" exception to ER 404(b)). Prior misconduct falling under one of the recognized exceptions must be relevant to prove an element of the crime charged and the trial court must find that its probative value outweighs its prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 175,

163 P.3d 786 (2007). We review a trial court's decision to admit evidence under ER 404(b) for an abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court abuses its discretion when it exercises it in an untenable or manifestly unreasonable way. *State v. Rupe*, 108 Wn.2d 734, 753, 743 P.2d 210 (1987).

Evidence of Jackson's prior problems with the dog kennels was not admissible under the res gestae exception. Under this exception, evidence of other bad acts is admissible to complete the story of the crime on trial by proving its immediate context or happenings near in time and place. *State v. Powell*, 126 Wn.2d 244, 263, 893 P.2d 615 (1995) (citations omitted). But the prior misconduct must constitute a "link in the chain" of an unbroken sequence of events surrounding the charged offense. *State v. Brown*, 132 Wn.2d 529, 571, 940 P.2d 546 (1997); *see also State v. Mutchler*, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989) (the misconduct must be an inseparable part of the whole deed or criminal scheme). Here, the 2007 complaint, although arguably related, is not part of an unbroken chain of events leading to the crime on trial. That Jackson's dog kennel was in an unsanitary condition nearly a year prior is not a necessary precursor to the 2008 charge of animal cruelty.

With respect to the knowledge exception, the trial court stated that "notice of some kind [of] knowledge as to the conditions" was an "essential element of the State's case." RP (July 7, 2008) at 28. The intent required for proving animal cruelty in the first degree is criminal negligence. A person acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in

the same situation. *See State v. Coates*, 107 Wn.2d 882, 892, 735 P.2d 64 (1987) (because criminal negligence is based on a reasonable person standard, a defendant may act without knowledge or intention without negating the requisite mental state). Although negligence requires no proof of awareness, Jackson's knowledge and subsequent disregard of an express risk constitutes a gross deviation from a reasonable person's conduct. In this way, the 2007 warning is relevant to the extent that a reasonable person would heed such a warning.

Moreover, the State had to prove that Jackson's lack of care caused the animals pain for an *extended period of time*. RCW 16.52.205. The complaint, which prompted testimony that the dogs were at a healthy weight in 2007, helped establish a reasonable inference that the dogs were starved over the course of the following year after Jackson assumed primary responsibility for the animals. And even if the evidence was only minimally relevant, it did not cause undue prejudice in light of the fact that Jackson was not living at the residence at the time of the complaint. The evidence did not suggest Jackson's propensity for neglect, only that he ignored a known risk and that the dogs went from a normal weight to emaciated under his care. As such, the evidence was relevant and admissible.

Regardless, the error, if any, was harmless. Evidentiary errors under ER 404(b) are not of a constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984). We must determine whether, within reasonable probabilities, the trial outcome would have been different had the error not occurred. *Jackson*, 102 Wn.2d at 695. To determine the probable outcome, we focus on the evidence that remains after excluding the tainted evidence. *Tharp*, 96 Wn.2d at 599. As we discussed in detail above, the remaining evidence was more than sufficient

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to convict Jackson on all counts. The State produced photos showing the animals' severe state of malnutrition and the condition of the kennel and dog house in 2008. The animal services officers and veterinarians described the condition of each animal and gave their opinion of the causal factors. The prognosis for Nikki was so poor that she was euthanized. In contrast, both Ginger and the gecko improved through regular feedings and minimally attentive care. We are satisfied the trial outcome would have been the same had the court excluded evidence of the 2007 incident.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.